

No. 14,519

IN THE

United States Court of Appeals

For the Ninth Circuit

WILLIE STANTON and MILDRED C. STANTON,  
*Appellants,*

vs.

UNITED STATES OF AMERICA,

*Appellee.*

On Appeal from the District Court of the United States  
for the District of Alaska, Fourth Judicial Division.

BRIEF FOR APPELLEE.

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**BRIEF FOR APPELLEE.**

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**QUESTION PRESENTED.**

Did the District Court for the Fourth Judicial Division, District of Alaska, abuse its discretion in an arbitrary and capricious manner by refusing to remit the judgment of \$5,000.00, taken against appellants, as sureties, upon default of an appearance bond.

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**COUNTERSTATEMENT OF THE CASE.**

Dwight T. Robinson was found guilty of larceny upon a government reservation on the 7th day of December, 1953, before the District Court for the

Fourth Judicial Division, District of Alaska. Robinson appealed to this Court (No. 14,274); however, said appeal was dismissed on March 31, 1954.

Appellants executed as sureties for Dwight Robinson an appearance (or supersedeas) bond in the amount of \$5,000.00, said bond having been filed on February 2, 1955, at which time Robinson, a private in the regular army, was released by the federal prison authorities. He returned to duty with the 450th Anti-Aircraft Artillery Battalion at Eielson Field, Alaska. The commanding officer of that unit immediately contacted the clerk of the lower Court to ascertain Robinson's status, and was informed by the clerk that Robinson would "be out on bond until the appeal is heard in San Francisco, California". (Tr. 30.)

Upon receipt of the information that Robinson was released on bond, the Army reactivated proceedings to separate Robinson from military service. These separation proceedings had been interrupted by the civil authorities of the federal government when Robinson was demanded for prosecution in connection with the larceny charge. The cause of his separation had occurred *prior* to his apprehension and conviction in the lower Court. (Tr. 28.)

Robinson was separated from the service at Ft. Lawton, Washington, on or about March 28, 1954. (Tr. 38.)

This Court's mandate in the *Robinson* case was entered and spread on the record of the District

Court on May 11, 1954. At that time, the bondsmen (appellants) were ordered to produce Robinson on May 17, 1954. This order was continued until May 28, 1954 (informally) and on that date, appellants were given a further extension of time until June 4, 1954 to produce the defendant. (Tr. 3.) On June 4, 1954, the Court ordered the bond forfeited and a bench warrant issued for Robinson's arrest, he was thereupon declared a fugitive from justice.

On the 12th day of July, 1954, Robinson was apprehended in the Southern District of West Virginia. (Tr. 9.) He had apparently been in Niagara Falls, New York on June 10, 1954.

Following the bondsmen's refusal to transport Robinson to Alaska, (Tr. 40) the United States removed the subject to Fairbanks and filed a motion for judgment in the amount of \$5,000.00 against the sureties. Judgment was entered upon July 26, 1954 (Tr. 22) for the full amount of the bond, pursuant to Rule 46(f) of the Federal Rules of Criminal Procedure. No motion to set aside the forfeiture was filed in this case prior to said judgment.

However, following entry of the judgment, appellants moved the Court for remission of the bond forfeiture of July 26, 1954, requesting that the forfeiture be set aside on the grounds that the default of Robinson was not wilful and that the default was occasioned by the "acts of the obligee" on the bond. This motion was denied upon August 3, 1954. Counsel for appellants then moved for reconsideration of

the motion to remit on the ground that the Court's ruling of August 3, 1954, would result in "gross injustice" to appellants and also that Robinson was "forcibly taken from the jurisdiction of this Court by the U. S. Army and without his consent and with knowledge on the part of the Army that said Dwight Robinson had been released on bail and was not to depart said jurisdiction". (Tr. 46.)

The motion for reconsideration was denied, and it is apparently from this order, dated August 6, 1954, that appellants have appealed to this Court. (Tr. 67.)

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#### **JURISDICTION.**

The jurisdiction of the Court below to enter the judgment against appellants as sureties was based upon Rule 46(f)(3) of the Federal Rules of Criminal Procedure. The motions pertaining to remission of the forfeiture were considered by the Court pursuant to Rule 46(f)(4) of the same rules.

This Court has jurisdiction pursuant to 28 U.S.C. 1291.

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#### **SUMMARY OF ARGUMENT.**

The judgment of July 26, 1954 against appellants has not been attacked. Only the propriety of the lower Court's refusal to remit the judgment against appellants is before this Court. It is not clear from the record which of the orders of the lower Court

pertaining to remission of the judgment upon the bond forfeiture has been appealed. However, both orders pertaining to remission of the judgment were denied by the district judge in the reasonable exercise of his discretion. No showing has been made by appellants that the Court's refusal to remit the bond or any part of it was arbitrary or capricious, nor have appellants shown that the default of their principal, Robinson, was occasioned by the acts of the obligee.

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#### ARGUMENT.

A trial Court has the power under Rule 46(f)(4) to remit the judgment "in whole or in part" if it "appears that justice does not require the enforcement of the bond forfeiture". (Rule 46(f)(2).) This implies the exercise of sound discretion, with regard to what is right and equitable under the circumstances. (*Smaldone v. United States*, 211 F. 2d 161 (10th Cir. 1954).) No obligation was placed upon the government to show the extent of its damage. (*U. S. v. Davis*, 202 F. 2d 621, 625 (7th Cir. 1953) *cert. denied*, 346 U.S. 819.)

In the present case, Judge Pratt had given appellants several extensions of time in order to produce Robinson for re-sentencing. Appellants' attorney was also Robinson's attorney. He had notice of this Court's action pertaining to Robinson soon after the entry of its decision on the 31st day of March, 1954. No attempt was made to produce Robinson even after

appellants' attorney received notification of his whereabouts. In fact, no attempt was made to return Robinson to the jurisdiction of the trial Court, even after the bond forfeiture, when appellants were informed specifically that Robinson was incarcerated in West Virginia. (Tr. 35, 41.) In view of this record, no valid claim can be made that appellants have demonstrated that "justice does not require the enforcement of the forfeiture".

Appellants have repeatedly signed bail and appeal bonds (Tr. 59, 60) and were cautioned concerning their obligation to the United States in the event of default. (Tr. 36.) They qualified as bondsmen to the extent of \$20,000.00; yet, at no time did they comply with the order of the Court pertaining to Mr. Robinson.

Appellants' motion for reconsideration (Tr. 46) also failed because they could not establish that Robinson "was not to depart" the jurisdiction of the lower Court. The bond executed by appellants is not a part of the record before this Court; no condition that the defendant, Robinson, was to remain in the "jurisdiction" of the lower Court is shown, nor did said bond contain such a condition.

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**NO ACT OF OBLIGEE PREVENTED  
ROBINSON'S APPEARANCE.**

The original order denying the motion to remit was also proper. While proof that the default was not wilful was necessary prior to Rule 46(f) (see, *U. S.*

*v. Hickman*, 155 F. 2d 897 (7th Cir. 1946); *U. S. v. Reed*, 117 F. 2d 808 (5th Cir. 1941); *U. S. v. Rosenfeld*, 109 F. 2d 908 (8th Cir. 1940)), this proof is no longer necessary (*Smaldone v. U. S.*, *supra*, p. 163). The only issue raised by said motion was, therefore, whether the acts of the obligee prevented Robinson from complying with the order of the District Court.

The landmark case of *Taylor v. Taintor*, 83 U.S. (16 Wall.) 366 (1872), relied upon by appellants, does not substantiate the claim of the bondsmen. In that case the Court ruled that sureties on an appearance bond before a Connecticut Court were not discharged because their principal had been forcibly extradited from New York to Maine by a Governor's warrant. At page 372, the Supreme Court said:

“When the recognizance was forfeited for the non-appearance of McGuire, the action of the governor of New York, pursuant to the requisition of the governor of Maine, had spent its force and come to an end. McGuire was then held in custody under the law of Maine to answer to a criminal charge pending there against him.”

Robinson was not held by anyone. He was released from the military service in the State of Washington, fully at liberty and able to contact his bondsmen. He traveled to the east coast of the United States rather than return the comparably short distance to Alaska. No act of the obligee caused his default, for Robinson was in no way restrained or prevented from appearing by the United States.

“When bail is given, the principal is regarded as delivered to the custody of his sureties. Their